SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 748

LIONEL C. CARSON, INFANT, BY HIS NEXT FRIEND, MARTIN A. CARSON, ET ALS., *Petitioners,*

vs.

HONORABLE WILSON WARLICK, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF NORTH CAROLINA, *Respondent.*

REPLY BRIEF TO BRIEF FOR RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

Petitioners herein file this Reply Brief in this cause as a response to the Opposing Brief of Respondent and pray the Court to consider this Reply Brief along with their Petition for Writ of Certiorari.

I

THE PETITIONERS' APPLICATION FOR WRIT OF MANDAMUS IN THE COURT BELOW WAS NOT DIRECTED AT THE EXERCISE OF JUDICIAL DISCRETION BY THE DISTRICT COURT, AS INTIMATED BY RESPONDENT IN HIS OPPOSING BRIEF, BUT IT WAS DIRECTED TOWARD THE CORRECTION OF ABUSIVE AND PALPABLE ERRORS OF LAW WHICH, THOUGH NOT APPEALABLE TO THE COURT OF APPEALS, WERE NONETHELESS HIGHLY PREJUDICIAL AND INJURIOUS TO EQUITABLE AND CONSTITUTIONAL RIGHTS OF THE PETITIONERS AND WHICH MERITED CORRECTION BY WRIT OF MANDAMUS.

The Respondent, in Argument IV of his Opposing Brief, states: "In effect, the petitioners are now asking this Court to grant the writ of mandamus which the Court of Appeals denied. The petitioners are in effect asking this Court to order the District Judge to allow the supplemental pleading to be filed." (Opposing Brief, Page 8). This erroneous and short-sighted view of petitioners' proceeding in the Court of Appeals is also reflected in the Statement of the Case in Respondent's Opposing Brief where he represents to this Court, ". . . the petitioners asked the Court of Appeals for the Fourth Circuit for a writ of mandamus directing the district judge to allow amendment of pleadings." (Opposing Brief, Page 3). Respondent is obviously attempting to convey to this Court the erroneous and self-serving impressions: (1) that petitioners complained in the Court of Appeals for the Fourth Circuit of the legitimate exercise of judicial discretion by the Respondent, as District Judge, (2) and that the petitioners sought in the Court of Appeals a writ of mandamus for the purpose of controlling the Respondent's discretionary power as District Judge. Indeed, Respondent troubled himself in his Opposing Brief by citation of authority presumably supportive of these "straw issues." A reading of Petitioners' Application for Writ of Mandamus, as presented to the Court of Appeals below, is enough to unmask these distorted notions which Respondent attempts to project concerning petitioners' proceeding in the Court of Appeals. See Application for Writ of Mandamus in the Record as certified by the Clerk of the Court of Appeals for the Fourth Circuit.

In their Application for Writ of Mandamus in the Court below the petitioners specifically prayed: "(3) That a Writ of Mandamus issue from this Court directing the Honorable District Judge to execute the mandate of this Court, to vacate his order of July 26, 1956, staying proceeding in this cause, to proceed with this cause as though the Pupil Enrollment Act had never been enacted, to proceed with this cause under the theory that plaintiffs have no adequate administrative remedy and to grant plaintiffs leave to file their proposed supplemental pleadings. (4) That plaintiffs have such additional relief and process as may be necessary and

appropriate in the premises." See Page 17 of the Application for Writ of Mandamus. This, without more, belies Respondent's convenient adoption in this Court of the contentions that petitioners complained of and sought to control Respondent's exercise of legitimate judicial discretion.

Moreover, it is respectfully submitted that Respondent should not be allowed in this Court to extract from his Order of July 26, 1956, the substantive, crippling and palpable errors therein contained by the convenient contrivance of labeling his ruling as a mere exercise of judicial discretion. It should be observed that Respondent's Order of July 26, 1956, concludes with the following peremptory language: "Wherefore, the Court being of the opinion *that the administrative remedies thus provided for have not been exhausted, announces that it will stay proceedings herein until such comes about* and on that being made to appear will order an immediate trial to the end that the deprivation allegedly brought about will be inquired into and the rights of the plaintiffs fully and completely protected." (Emphasis added.) See Page 24, Petition for Writ of Certiorari, where the Respondent's Order of July 26, 1956, is reproduced. With this Order in mind, it is inconceivable that Respondent could have justifiably supposed that he was merely exercising a judicial discretion relative only to the filing of supplemental pleadings. It is further observed that the Respondent's stay of proceeding, pending exhaustion of so-called administrative remedies, is the law of this case unless his ruling is altered by this Court.

Finally, the Court of Appeals below did not subscribe to the notions that the petitioners were complaining of and seeking therein to control Respondent's discretionary power. In stating the case made by petitioners upon their Application for Writ of Mandamus, the Court of Appeals for the Fourth Circuit said:

> "The applicants did not attempt to comply with the provisions of the statute as so interpreted by the Supreme Court of North Carolina, but on July 11, 1956, counsel who are representing them before this court wrote a letter to the secre-

tary of the Board of Education, inquiring what steps were being taken for the admission of Negro children to the Old Fort School. The secretary replied that 'inasmuch as no Negro pupil has made application, nor has any parent or person standing in loco parentis made application for any Negro child to attend school in the town of Old Fort for the school year 1956-57, the Board had had no cause to take any action in this connection.

"Upon receiving this reply, applicants here, plaintiffs in the court below, on the 12th day of July 1956 moved in the action there pending to file a supplemental complaint in which, without alleging compliance with the requirements of the North Carolina statute as interpreted by the Supreme Court, they asked a declaratory judgment and injunctive relief with respect to their right to attend the Old Fort School. The District Judge denied the motion on the ground that plaintiffs had not exhausted their administrative remedies and stayed proceedings in the cause until same should be exhausted, but stated that, as soon as it was made to appear that they had been exhausted, he would grant such relief as might be appropriate in the premises, . . ."

"Upon the denial of the motion, application for writ of mandamus was filed here to require the District Judge to vacate the order staying proceedings, to allow the supplemental pleading to be filed and to proceed with the cause 'as though the Pupil Enrollment Act had never been enacted.'" Appendix "A," Pages 16 and 17.

See Opinion of the Court of Appeals, Pages 16 and 17 of Petition for Writ of Certiorari and *Lionel C. Carson et als. vs. Honorable Wilson Warlick, No. 7281,* 238 F. 2d 724. Again, the Court of Appeals ruled upon all of the issues presented by petitioners, holding that, "Applicants here are not entitled to relief because of failure to exhaust what are unquestionably administrative remedies before the board." Thus, it overwhelmingly appears that petitioners complained in the court below of errors of law rather than

of Respondent's exercise of judicial discretion; that Respondent, as District Judge, made peremptory rulings of law rather than a mere ruling disallowing the filing of supplemental pleading; and that the court below presumably undertook to review and resolve decisive legal questions involved rather than mere discretionary functions of the District Court.

Petitioners further submit that the following authorities are controlling on the question of the availability of mandamus for the purpose for which petitioners sought extraordinary relief: *McClellan v. Carland*, 217 U.S. 283, 30 S.Ct. 501, 54 L.ed. 762, where mandamus was held the proper remedy to dissolve an improper stay of proceeding; *Ex Parte Simmons*, 247 U.S. 231, 38 S.Ct. 487, 62 L.ed. 1094, where mandamus issued to prevent severance of an action containing two counts, by which device the trial court presumed to retain one count for trial by jury as a suit at law and to transfer the other count to the equity docket; 28 U.S.C. 1651. See also *Re Frank D. Winn*, 213 U.S. 458, 29 S.Ct. 515, 53 L.ed. 873; *Ex Parte United States*, 242 U.S. 27, 37 S.Ct. 476, 61 L.ed. 129; *Delaware Lackawanna & Western Railroad Company v. John Rellstab*, 276 U.S. 1, 48 S.Ct. 203, 72 L.ed. 439; *Ex Parte Edelstein*, (C.C. 2nd), 30 F. 2d 636.

II

THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF THE COURTS OF APPEALS FOR OTHER CIRCUITS AND IS NOT RECONCILABLE WITH THE DECISIONS OF OTHER CIRCUITS, AS INTIMATED BY RESPONDENT IN HIS OPPOSING BRIEF.

In his Opposing Brief, Respondent repeatedly asserts and underscores the proposition that "The question of exhausting administrative remedies under a pupil assignment statute was nowhere involved in the" cases cited by petitioners in their Petition. The assertion is directed toward petitioners entreaty that the Court

issue the Writ of Certiorari to resolve a conflict between the Courts of Appeals on the question of the applicability of the doctrine of exhaustion of administrative remedies.

Respondent does not address himself to the petitioners' contention that the Court of Appeals for the Fourth Circuit is in conflict with other circuits in failing to enforce the duty of first instance compliance upon school authority to de-segregate their school. Respondent merely distinguishes the instant case from cases decided by other circuits upon the untenable and immaterial grounds that the so-called administrative remedies in North Carolina are expressly of state statutory origin. Nevertheless, assignment of public school pupils by administrative agents to segregated schools was involved in each of the cases cited by petitioners as examples of cases where exhaustion of so-called administrative remedies was not required. In each case contention was made by school authorities that the action was premature or precipitate, in view of administrative considerations and problems. And in *Brown et al. v. Rippy et al.* (C.A. 5th), 233 F. 2d 796, Judge Cameron expressly dissented upon the grounds that administrative remedies had not been exhausted. We are not told what mysterious power to abridge petitioners' constitutional rights is conferred by enactment of a statutory scheme, the obvious purpose of which is to circumvent the ruling of this Court. Moreover, in a recently decided Louisiana case, *Bush v. Orleans Parish School Board,* (C.A. 5th), ... F. 2d ....., the Court of Appeals for the Fifth Circuit has discounted and held unconstitutional a pupil assignment statute very similar to the North Carolina pupil assignment scheme and has held inapplicable a statutory plan for delay in de-segregating public schools via invocation of the doctrine of exhaustion of administrative remedy. Finally, the very recent decision in the *Bush Case, supra,* leaves no doubt of the *conflict between the Fourth and Fifth Circuits* upon the question of the applicability of the doctrine of exhaustion of administrative remedies to public school de-segregation cases.

But assuming against fact that the question of exhaustion of administrative remedies *under a pupil assignment statute* is first

met in North Carolina and in this Circuit, such a circumstance would not mitigate against the propriety of certiorari but would rather render certiorari even more appropriate, in that the Court of Appeals for the Fourth Circuit would have "decided an important question of federal law which had not been, but should be, settled by this Court," Rule 19, Revised Rules of the Supreme Court of the United States. See *New York v. United States,* 326 U.S. 572, 66 S.Ct. 310, 90 L.ed. 326; *United States v. Petty Motor Company,* 327 U.S. 372, 66 S.Ct. 596, 90 L.ed. 729, where certiorari issued under this phase of Rule 19.

CONCLUSION

It is respectfully submitted that the proceeding in the Court below for a writ of mandamus was not directed at the exercise of judicial discretion by the District Court but that it was directed toward correction of abusive, palpable and unappealable errors of law committed by Respondent as District Judge; that nothing appearing in the Records certified to this Court or in the Respondent's Opposing Brief emaciates petitioners' prayer in this Court for a Writ of Certiorari; and that the case made by petitioners in their Petition for Writ of Certiorari and by the Records and lower Court Opinions in this cause more than justify the issuance by this Court of a Writ of Certiorari to review the Order and Decision of the United States Court of Appeals for the Fourth Circuit.

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